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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FRANCISCO ARTURO SALAZAR, Appellant.	2 CA-CR 2007-0348 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-53244

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Patrick C. Coppen — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Following a jury trial, appellant Francisco Arturo Salazar was convicted of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration of .10 or more, both while his privilege to drive was suspended.[1]

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[1]Former A.R.S. § 28-2881(A)(2), in effect when Salazar committed the offenses in May 1996, prohibited driving with an alcohol concentration of .10 or more. The statute now prohibits driving with an alcohol concentration of .08 or more. *See* A.R.S. § 28-1381(A)(2); 2001 Ariz. Sess. Laws, ch. 95, § 5.

The trial court suspended the imposition of sentence and placed Salazar on a ten-year term of probation supervision with the condition that he spend four months in jail. Salazar appealed.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he has reviewed the record and found no meritorious issues to raise on appeal. He asks this court to search the record for fundamental error and directs our attention to five "arguable issues." Salazar has not filed a supplemental brief.

¶3 Viewed in the light most favorable to upholding the jury's verdict, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence at trial adequately supports Salazar's convictions. An officer who stopped Salazar for a traffic violation noticed he had watery, bloodshot eyes and slurred speech, smelled strongly of "intoxicants," and he staggered when he got out of his vehicle. When asked if he had been drinking, Salazar responded by holding up five fingers and stating he had consumed four beers. He performed poorly on field sobriety tests, and breath tests administered at the scene revealed he had an alcohol concentration of .168 and .174 within two hours of driving. The custodian of records for the motor vehicle division testified that Salazar's privilege to drive had been suspended prior to, and remained effective on, the date in question and that notice of the suspension had been personally served on Salazar.

¶4 Trial commenced on October 29, 1996, in Salazar's absence, after the court overruled the following objection:

> Just for the record, Your Honor, I need to object to [Salazar's] being tried in absentia. My understanding is that he was

> arraigned, and he was notified. And the basis to my objection is that that isn't sufficient notice, that the language used is that he "may be" tried in absentia, and he has not received notice of this particular trial date. There's been several reschedulings of this trial.

Later that day, however, the court granted defense counsel's motion for a mistrial, concluding a police officer's testimony—that Salazar had shown "the signs and symptoms of what we consider an intoxicated person"—constituted prejudicial opinion testimony about Salazar's guilt. *See Fuenning v. Superior Court*, 139 Ariz. 590, 605, 680 P.2d 121, 136 (1983). A second trial commenced the following day, also in Salazar's absence.

¶5 Counsel raises the following as arguable issues: whether the second trial violated Salazar's rights against double jeopardy and whether the trial court "erred in finding that [Salazar] had voluntarily absented himself" from trial. But these issues do not merit reversal. "When a defendant moves for a mistrial, the state may generally reprosecute unless the mistrial was the product of prosecutorial misconduct or judicial overreaching." *State v. Aguilar*, 217 Ariz. 235, ¶ 10, 172 P.3d 423, 426 (App. 2007). No such misconduct or overreaching occurred here. Rather, the court found the mistrial was necessary because of "an error made by a new officer . . . [who] was only attempting to clarify earlier testimony, and inadvertently used some language that would make continuance of th[e] trial an error." Nor did the trial court abuse its discretion by finding Salazar was voluntarily absent for trial. *See State v. Bishop*, 139 Ariz. 567, 569, 679 P.2d 1054, 1056 (1984) (finding of voluntary absence is question of fact that will not be disturbed absent an abuse of discretion). Prior to his release, Salazar was warned that it was "his responsibility to be aware of the trial date and should he fail to appear for trial, the trial could proceed in his absence." Thereafter, he

apparently absconded and was not found until September 2007, when he was arrested pursuant to a bench warrant that had been issued before trial. A defendant's "decision to violate his conditions of release by absconding" constitutes "a voluntary waiver of the right to be present at his trial." *State v. Holm*, 195 Ariz. 42, ¶ 4, 985 P.2d 527, 528 (App. 1998), *disapproved on other grounds by State v. Estrada*, 201 Ariz. 247, 34 P.3d 356 (2001).

¶6 Appellate counsel also asks us to consider whether the trial court fundamentally erred by "repeatedly advising the jury that [Salazar] had chosen to absent himself from trial" without also advising it that Salazar had a constitutional right to do so. Again, we find no error, let alone fundamental error. The court instructed the jury that "any defendant in a criminal case may voluntarily absent himself from any hearing, including his trial," and that they were prohibited from "draw[ing] any conclusions" from Salazar's absence. The court's failure to inform the jury that Salazar had a *constitutional* right to be absent from trial was not error. Moreover, we presume that the jury followed the court's instruction and did not consider Salazar's absence against him. *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007) ("We presume jurors follow instructions.").

¶7 Next, counsel raises as an arguable issue, "[w]hether the trial Court erred in allowing [Salazar's] BAC to be imparted to the jury during Opening Argument prior to it being properly admitted at trial." But "[o]pening statements are intended to inform the jury of what the party expects to prove and prepare the jury for the evidence that is to be presented." *State v. King*, 180 Ariz. 268, 278, 883 P.2d 1024, 1034 (1994). Thus, the

trial court did not err in denying Salazar's motion to preclude mention of this anticipated evidence.

¶8 Finally, counsel suggests the trial court's use of the reasonable doubt instruction mandated in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), constitutes an arguable issue for appeal. The instruction, however, was required by our supreme court's holding in *Portillo*, and we are required to follow it. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Thus, the trial court did not err by giving it. *See State v. Roseberry*, 210 Ariz. 360, ¶ 55, 111 P.3d 402, 412 (2005).

¶9 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety and find no error warranting reversal. Therefore, we affirm Salazar's convictions and the probationary term the trial court imposed.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge